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May 20, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98)

Dear Mr. Caton:

Transmitted herewith on behalf of GST Telecom, Inc. ("GST"), are an original and twelve (12) copies of Comments of GST Telecom, Inc. In addition, a paper copy of the Comments is being served on International Transcription Services, and four (4) paper copies and a diskette are being served on Janice Myles of the Common Carrier Bureau.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return to the undersigned in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,

Eric J. Branfman

Enclosures

cc: Janice Myles
ITS

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List ABCDE

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF GST TELECOM, INC.

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Dated: May 20, 1996

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SUMMARY

GST Telecom, Inc., a competitive access provider, urges the Commission to establish rules that will ensure that new entrants are not impeded in their ability to enter the market by discriminatory tactics on the part of incumbent LECs or other entities that control access to poles, ducts, conduits, and rights-of-way. GST notes that access to poles, ducts, conduits, and rights-of-way is critical to new entrants and that it has, in the recent past, been subjected to such discriminatory tactics, with the result that its entry into certain markets has been delayed and been made more costly. GST therefore urges the Commission to establish rules that not only will prohibit the use of "exclusive" contracts and other devices to discriminate against new entrants, but that will ensure that new entrants also be provided swift physical access to such poles, ducts, conduits, and rights-of-way. Further, the Commission should prescribe penalties for failure to grant prompt access that will provide owners with an incentive to grant access quickly without the need for the new entrant to resort to the Commission or to the State commission.

GST urges the Commission to construe narrowly the exceptions to the Congressional requirement of nondiscriminatory access and to issue regulations that ensure that a utility fairly and reasonable allocates capacity. GST also recommends that the Commission create rules that restrict owners of pole, ducts, conduits, and rights-of-way from engaging in unnecessary or burdensome modifications or specifications. GST also urges the Commission to ensure that when an owner modifies a pole, duct, conduit, or right-of-way to make it more accessible, existing carriers not be assessed for modification costs to they extent that they bring the owner additional revenue.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF GST TELECOM, INC.

GST Telecom, Inc. ("GST"), by its undersigned attorneys, hereby submits its Comments in the above-captioned proceeding. In its Comments filed in this proceeding on May 16, 1996, GST provided a brief description of the nature of its business. In these Comments, GST discusses access to rights-of-way and conduit owned or controlled by incumbent LECs or other utilities (NPRM, ¶¶ 220-25).

The NPRM requests comments on two subsections of Section 224 relating to access to utility-controlled poles, ducts, conduits, and rights-of-way, in light of the fact that Section 251(b)(4) specifically imposes a duty to comply with the provisions of Section 224. In responding to these questions, GST notes that the "rights-of-way" to which access must be provided include, among other things, manholes, cable entrance ways into buildings, telephone equipment rooms and wiring closets, and utility-controlled risers, conduits, and lateral ducts within the common areas of multi-tenant buildings. (For convenience, GST refers to poles, ducts, conduits, and rights-of-way generically as "rights-of-way.")

I. Access to Rights-of-Way Is Critical for New Entrants

The success of new entrants in penetrating the local exchange market to compete with incumbent LECs will be significantly influenced by their ability to access without undue delay existing rights-of-way that are either owned or controlled by municipalities, incumbents or other utilities. New entrant carriers such as GST will have to lay their fiber optic cable within existing rights-of-way in order to create more efficient (and, correspondingly, more competitive) cost structures independent of the incumbent LEC. In the absence of a regulatory framework to make the current infrastructure immediately and unconditionally available to new entrants, these beneficial, pro-competitive activities will be stalled -- perhaps indefinitely. Congress amended the Communications Act of 1934 to provide new entrants nondiscriminatory access to LEC premises and other rights-of-way controlled by utilities, to prohibit state and local governments from discriminating in the management of the public rights-of-way, and to give the Commission a more prominent role in regulating the terms and conditions of such access.

In these Comments, GST urges the Commission to carry out its duties under the Act in a manner that would nurture burgeoning local competition through definitive national standards. Otherwise, based upon the experience of GST in attempting to construct its networks over the past several years, entities that control rights-of-way will inevitably seek to use the great expense that delay imposes upon an entrant to exact discriminatory terms in consideration for allowing the entrants to proceed with their projects. This is truly an instance in which the adage "time is money" applies. Such rules must therefore ensure that when disputes over use of right-of-way arise, they can be swiftly resolved.

II. The Act Provides New Entrants With Access to Rights-of-Way Either Owned or Controlled by Incumbents LECs and Other Utilities (NPRM, ¶ 220)

In order to construct its networks, new entrants require access to rights-of-way that incumbent LECs, or other utilities defined in Section 224(a)(1), control and may or may not own. Section 224(f)(1) now grants new entrants the right to place their facilities on "any pole, duct, conduit, or right-of-way owned or controlled by" a utility, including incumbent LECs. Access by itself however, is insufficient. New entrants need immediate access at just, reasonable, and nondiscriminatory rates and other terms and conditions. GST urges the Commission to complete its rulemaking under Section 224(e)(1), setting such rates, terms and conditions according to the formula in Section 224(d)(1), as soon as possible. With many business plans already underway, delayed access for new entrants may continue to mean no access at all.

III. New Entrants' Right to "Nondiscriminatory Access" Entitles Them to Access Rights-of-Way on the Most Favorable Terms Currently Offered by an Incumbent LEC or Other Provider to Any Party, Including Itself (NPRM, ¶ 222)

Nondiscriminatory access to rights-of-way under Section 224(f) means that incumbent LECs and other utilities must make their facilities available for use by other entities and that the terms of access cannot vary with the identity of the requesting carrier. (NPRM at ¶ 222.) Every carrier has a right to reasonable access at no less than the best terms currently offered in the market to any other carrier, including affiliates of the incumbent. (If the terms currently offered to other users are unreasonable, entities seeking access under the new Act are entitled to access under reasonable terms.) GST's efforts to construct its networks have been hampered repeatedly by violations of these principles. For example, in Tucson, the electric utility continually refused to allow GST to attach

fiber to its poles upon the same terms that it accorded the incumbent LEC and another "favored" new entrant. To obtain access to the electric utility's poles, GST was forced to file complaints before the Arizona Corporation Commission and in the United States District Court. The complaints were eventually settled and GST allowed to use the electric utility's poles, but at great expense and delay to GST. GST's Tucson efforts have also been impeded for many months by the imposition of discriminatory conditions by the City of Tucson for the use of the public rights-of-way. The City of Tucson has insisted that GST pay the City substantial sums and perform expensive and substantial non-monetary obligations in exchange for the use of the public rights-of-way that it does not exact from the incumbent LEC. As a result, GST has been forced to file suit against the City of Tucson in United States District Court.[1/] GST and its competitors have had similar problems gaining nondiscriminatory access to rights-of-way in many other jurisdictions. Unquestionably, strong measures are needed from the Commission to ensure that utilities and municipalities alike cease their efforts to exploit the emerging competition in telecommunications by attempting to exact discriminatory terms from new entrants.

GST believes that "nondiscriminatory access" means precisely what it says, and therefore that a utility may not deny another telecommunications carrier access to its rights-of-way for *any* reason other than those specifically authorized by subsection (f)(2), subject to the payment of compensation pursuant to the other provisions of Section 224. Even here, Congress simultaneously obligated the electric companies to carry the burden with respect to the showings required under Section 224(f)(2). (NPRM at ¶ 223.) The Commission will be better able to render an informed

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1/ A copy of GST's Complaint is attached as Exhibit A hereto.

decision if electric utilities have the burden of justifying any constraints on access and establishing the reasonableness of their position. In this regard, this Commission should establish minimum standards with a quantifiable threat to safety before access can be denied. It is important here to realize that competitive carriers often set the industry standard for technical specifications and maintenance of telecommunications systems, and that such companies are well versed in engineering and safety issues. There is almost no circumstance under which they should be denied access. This is particularly true in those rare instances where safety is truly of great concern, since the electric company can itself construct or supervise the access.

The question of whether there is sufficient capacity for another carrier's facilities will generally be dependent on the facts, but the Commission can establish certain substantive standards as well as procedures for ascertaining the relevant facts. Substantively, the Commission's rules should provide that access may not be refused due to insufficient capacity if it is possible to rearrange the existing facilities using the right-of-way (consistent with applicable engineering standards) to accommodate the new user and/or to construct new facilities.[2/] For example, in the case of underground installations it is often possible to accommodate additional users by installing additional duct or innerduct in the existing conduit, and in the case of pole attachments it usually is possible to move existing attachments.[3/] The rules should also specify that right-of-way owners may

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[2/] Under these circumstances, Section 224(i) would require the new user to pay all costs associated with any such rearrangement.

[3/] It is also possible to accommodate additional users on poles by "overlashing"; that is, by attaching a new user's cable to an existing cable rather than attaching it directly to the pole. This can cause added strain on the existing cable, however. The pole owner should not be entitled to impose the risk of this added strain on one of its competitors by compelling that competitor to

(continued...)

not reserve unused space for their own future use unless they provide the same opportunity for future expansion to all other future users of the facility on a nondiscriminatory basis. Procedurally, the rules should assure an opportunity for any party contesting a claim of insufficient space to audit the utility's outside plant records in order to verify the claim, and if necessary to conduct a physical inspection of the right-of-way in dispute.

The other basis for refusing access is "reasons of safety, reliability and generally applicable engineering purposes." A utility relying on this provision to refuse access should be prepared to justify its decision based upon published and accepted safety or engineering standards, such as the National Electrical Code. It is important that neutral safety, reliability, and engineering standards be identified in advance in order to avoid the potential for a utility to use a safety or reliability issue as a pretense for discrimination. In addition, the Commission should limit the ability of right-of-way owners to impose fees for surveys and engineering reviews of proposed facility installations. These fees are often inflated by overhead loading factors and other inappropriate costs. Utilities should be compensated fully for their relevant right-of-way costs through the rates to be established under Section 224(e), so there is no justification for allowing them to impose additional survey or design review fees recovering anything beyond the incremental costs incurred in the survey or design review activities. Some utilities have also been known to inflate these preparatory fees by claiming that their personnel are unavailable to do the required work except on an overtime basis. Utilities

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3/ (...continued)
accept overlashing on its attachment. Rather, the statute's mandate of nondiscriminatory access requires that the pole owner establish in advance a neutral procedure for determining which cables will be subject to overlashing, which may not favor the pole owner's own cables over those of other parties.

should not be entitled to charge for overtime unless the entity requesting the attachment specifically requests that work be done outside of normal business hours.

To help it administer right-of-way issues, the Commission should promulgate regulations "to ensure that a utility fairly and reasonably allocates capacity." (NPRM at ¶ 223.) Such regulations would assist and, perhaps, speed negotiations over rights-of-way, alleviating the need for the Commission to intercede and resolve disputes. In all events, expedited access to such rights-of-way must be structured, if competition is to flourish in the manner intended by the Act.

IV. A New Entrant Has Reasonable Notice of Pending Modifications to Certain Rights-of-Way Only When It Is Able to Avert Interference with Its Network (NPRM, ¶ 225)

The Commission has asked commenters to address the meaning of the term "reasonable opportunity" in Section 224(h) (which provides that an owner of a pole, duct, conduit, or right-of-way shall provide an occupant with written notice and a reasonable opportunity to add or to modify an existing attachment). Because of the need to avoid unduly disturbing the operations of telecommunications carriers, GST proposes defining the term from the perspective of the particular carrier using a specific right-of-way. GST suggests that a carrier receive "reasonable opportunity" to add to or modify its use of a certain right-of-way, that is to be modified or altered by the owner, only if it is able to prevent its network from being disrupted and such disruption occurs without undue expense. Such a standard would effectively protect the interests of telecommunications carriers, as Congress intended to do through Section 224(h). Alternatively, the Commission could impose a fixed time standard. GST believes that sixty days advance notice would be appropriate for relocation or modification of an attachment, except in cases of emergency (for example, where an

existing facility is damaged or destroyed and must be replaced immediately), in which case the owner should give as much notice as is practicable. GST agrees that the Commission should create rules that restrict owners of rights-of-way from engaging in "unnecessary or unduly burdensome modifications or specifications." (NPRM at ¶ 225.) Incumbent LECs have strong incentives to generate new costs of doing business for their competitors through pointless modifications of shared rights-of-way. The Commission must check such anticompetitive activity through the rules that arise out of the instant proceeding.

V. In Calculating a Carrier's "Proportionate Share of the Costs" of Making a Right-of-Way "Accessible" Under Section 224(h), the Commission Must Take into Account Any Additional Profits that the Owner Reaps As a Result of the Carrier's Modifications (NPRM, ¶ 225)

Subsection (h) provides that any user that "adds to or modifies its existing attachment" shall bear a proportionate share of the costs incurred by the owner. The term "modifies" in this provision should be interpreted as applying only where there is some improvement or change in the nature of the attachment being used by an entity. If the entity retains precisely the same attachment as it had before the owner's modification or alteration, even if moved to a different location, it should not be assessed a share of the owner's costs. The Conference Committee report discussing Section 224(h) makes clear that the assessment of cost was intended to apply only to an entity "that takes advantage of [an] opportunity to modify its own attachments[.]"[4/] An entity that merely preserves its existing attachment is not "taking advantage" of an "opportunity," but merely maintaining the *status quo ante*, and therefore should not be penalized.

4/ H.R. Rep. 104-458, 104th Cong., 2d Sess. 207 (1996).

If carriers accessing rights-of-way are required to pay a proportionate share of the costs under Section 224(h) of making an individual right-of-way accessible after modifications, they must also receive a credit for any additional profits that result from the modified right-of-way. The Commission should interpret the term "costs" to encompass only true costs, and to exclude investments that later yield more profits. For instance, if the owner enlarges its right-of-way to provide access to a that carrier should only pay the proportionate costs of the construction, minus any additional profits that the owner later realizes from the sale of extra, newly-built space to other carriers. Considerations of equity and fairness demand that profits offset costs in this manner whenever possible.

VI. Any Rules and Regulations Promulgated by this Commission Must Ensure that Incumbent LECs and Other Utilities Complete Access to Other Carriers on an Expedited Basis

Very often, carriers seeking access to rights-of-way owned or controlled by incumbents or other utilities (or municipalities) are stone-walled at the very outset. Even if established procedures for requesting access exist, which is rare, months usually pass without meaningful dialogue or discussion. All too often, competitive carriers seeking access are forced to threaten litigation or regulatory action to force any progress. Such threats inevitably sour the working relationship and sometimes appear to be the basis for future retaliatory delays.

Entities which control the access to rights-of-way frequently contend that the resources needed to coordinate and effect the requested access are constrained and must be devoted to other municipal, incumbent or utility business. This contention typically is the explanation given for the lengthy time it often takes to actually grant a carrier physical access after the utility has agreed to

make such access available. Months will pass before the necessary make-ready work is finished, and any communication or logistical problem between the utility and other existing users of the rights-of-way (e.g., cable companies, joint owners of poles, etc.) necessary to reconfiguring the use of the rights-of-way to afford new users access, remain unaddressed and unsolved. Competitive access to rights-of-way should not be held hostage to indifference or limited resources -- such problems plague every owner of rights-of-way and are a sure inhibitor of competition.

The solution for this problem is for this Commission to establish firm and swift deadlines by which time physical access must be completed. GST suggests that not more than forty-five (45) days be allowed to expire between the initial request for access and the actual physical completion of such access. Moreover, any recourse to this Commission should be fast and sure and carry meaningful penalties and sanctions for failing to afford access on the terms and conditions and within the time-frames set by the Commission. Incumbents and utilities will be influenced only by the knowledge that Commission involvement will carry more risk than if access is routinely granted without the need for Commission involvement (or the threat thereof). Otherwise, incumbents and other utilities may delay up until the moment that this Commission mandates the access that the competitive carrier originally requested. Once the incumbents and and other utilities are placed on notice that this Commission insists on swift and expedited access, the inevitable roadblocks and delays to such access should begin to disappear.

VII. Access by Competitive Carriers Cannot be Affected or Complicated by Exclusive Arrangements Between Incumbents and Utilities and Other Third Parties

Increasingly, utilities, specially municipally-owned utilities, are entering into exclusive arrangements with one carrier to build out new and make use of existing and future rights-of-way. Such arrangements typically, but not always, are the result of a Request for Proposal ("RFP") process by which the owner of rights-of-way evaluates the respective qualifications and bids of entities who seek access to the rights-of-way, and selects one favored carrier. Requests for access by other carriers are then rejected because of the "exclusive" nature of the provider-third party arrangement. Often such arrangements involve the use of all dark fiber, unused ducts and other uncommitted facilities into the future.

Such arrangements often defeat access by other parties, and frustrate the intent of the 1996 Act. Not only does the RFP process consume a lot of time and subject carriers who need access to an unwarranted "beauty contest," and require the "winner" to expend large sums of money to build facilities or provide free or discounted services to be used by the owner of the rights-of-way, such exclusive arrangements also ensure that other carries needing access will be either preempted completely or that their access will be refused unless they agree to the same business arrangement (on a subordinate basis).

This Commission should act to ensure that such access arrangements are fully voluntary and that such arrangements do not and cannot adversely affect the rights of other entities which seek access to the same rights-of-way. At a minimum, such entities should not have to participate in or be delayed by an RFP process. Furthermore, the voluntary business arrangement should itself be reviewable by this Commission for its impact upon competition. Other carriers seeking access must

be granted access to the rights-of-way on nondiscriminatory and reasonable terms and conditions -- which should not be inflated or influenced by the prices acceptable to a carrier who believes that it is obtaining exclusive access. Nor should other carriers be charged the costs of relocating users of such rights-of-way that would have been avoidable had the exclusive arrangement not existed. In summary, the entire risk and cost of an "exclusive" arrangement must be borne by the utility and the "exclusive" third party, and such arrangements must proceed on an entirely separate track. The Commission must mandate such result emphatically and ensure that the ramifications of failing to proceed pursuant to this Commission's rules and regulations are sufficiently severe that other carriers seeking fair and nondiscriminatory access, and who do not seek to enter into these types of arrangements, are not forced to always complain about such arrangements to this Commission.

CONCLUSION

GST has expended many months and substantial amounts of money, including attorneys' fees, attempting to obtain access to rights-of-way owned or controlled by municipalities, municipal utilities, incumbents and other utilities. The hurdles imposed in the way of such access are often great -- with municipalities insisting on discriminatory, expensive, and time-consuming franchises, and utilities either completely resisting such access or engaging in delay tactics which result in access only for the most determined and well-financed competitive carriers. The Act mandates competition without hindrance or delay. It is left to this Commission to determine how to accomplish this mandate, and it is at these frontlines that the Commission must succeed.

There is almost no legitimate basis for distinguishing the conditions of access -- regardless of whether such access is to municipal, incumbent or utility rights-of-way. Time-frames within which access to rights-of-way must be granted and physically completed must be brief and certain.

The costs of such access must be allocated fairly, and protected from the results of a market with too much demand for access and a (deliberately) suppressed supply. Competitive carriers must be shielded from municipalities and utilities who seek to provide access to fewer than all competitive carriers or seek to vary the terms of access. Providers of rights-of-way must be given the incentive to devote the necessary resources to allocating and supervising such access. The burden and presumption in favor of swift, fair and nondiscriminatory access must be placed on the provider of the rights-of-way, and a clear incentive for complying with the Act and with this Commission's rules and regulations established.

All of this must be accomplished by detailed and clear rules and regulations established by this Commission in the fullest possible exercise of its jurisdiction. Now that the battle for competition has been fought and won at the national (and conceptual) level, the implementation of the Act must be effected at the local level -- where competition will thrive or suffer depending upon the extent to which and the manner in which access to the rights-of-way that are essential to competition is accomplished.

Respectfully submitted,

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Dated: May 20, 1996

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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CV 96-326 TUC JMR

GST TUCSON LIGHTWAVE, INC., an Arizona corporation, Plaintiff, vs. CITY OF TUCSON, an Arizona municipal corporation, Defendant.	NO. _____ **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

J. Jeffrey Mayhook
GST TELECOM, INC
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Plaintiff, GST Tucson Lightwave, Inc. (GST), by its attorneys, complains against Defendant, City of Tucson, as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff GST is an Arizona corporation with its principal place of business in Arizona. GST's parent company, GST Telecom, Inc., is wholly owned by GST USA, Inc., a Delaware corporation wholly owned by GST Telecommunications, Inc., a Canadian corporation traded over the American and Vancouver stock exchanges.

2. Defendant City of Tucson is a municipal corporation recognized as a duly constituted political subdivision of the State of Arizona.

3. Pursuant to 28 U.S.C. § 2201 and Federal Civil Rule 57, this is a suit for declaratory judgment and injunctive relief arising out of the Defendant City of Tucson's failure to manage its public rights-of-way in a competitively neutral and nondiscriminatory manner, which violates the Telecommunications Act of 1996 at Section 253(c), 47 U.S.C. § 253(c). One of the Act's many provisions concerned with ensuring that new entrants will have fair opportunity to compete effectively in communities like Tucson, Section 253(c) prohibits State and local governments from discriminating against competing telecommunications providers:

> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed

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by such government.

4. This Court has jurisdiction over the subject matter of this action under Section 1331 of the Judicial Code, 28 U.S.C. § 1331.

5. Venue is proper in this district under 28 U.S.C. § 1391(b).

THE CITY OF TUCSON'S VIOLATION OF THE TELECOMMUNICATIONS ACT OF 1996

6. GST qualifies as a telecommunications carrier providing telecommunications services within the meaning of the Telecommunications Act of 1996, 47 U.S.C. § 3. GST's ultimate parent corporation was formed to develop, construct and operate alternate access and other telecommunications systems within the United States. Operating networks in fourteen cities in the western United States and Hawaii, with an additional six cities under construction in the San Francisco Bay area, the GST family of companies provide a broad range of integrated telecommunications products and services to customers located primarily in Tier II and Tier III markets (cities with populations between 250,000 and 2,000,000). In addition to deploying state-of-the-art fiber optic transmission networks, the company also manufactures telecommunication switching equipment and provides network management and billing systems through a wholly-owned subsidiary, National Applied Computer Technologies, Inc. of Orem, Utah. For additional company information, see GST Telecommunications, Inc.'s 1995 Annual Report attached hereto as Exhibit A.

7. Desiring, among other things, to install a Class 5 digital switching platform for a planned competitive local exchange network in Tucson, GST has requested that

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the City of Tucson grant GST a non-exclusive license and a non-exclusive franchise to construct, maintain, and operate facilities in designated portions of the City of Tucson's public rights-of-way. See, GST's March 12, 1996, and April 10, 1996, correspondence to the City of Tucson, respectively attached hereto as Exhibits B and C.

8. The grant of a non-exclusive license is necessary to allow GST to construct, maintain, and operate a fiber optics communications system in, over, under, and across portions of the City of Tucson's public rights-of-way for the purpose of providing interstate long distance telecommunications services and interstate long distance telecommunications access services within Tucson. The City of Tucson has previously granted GST a non-exclusive telecommunications license allowing GST to install fiber optic cable for the purpose of providing long distance telecommunications within Tucson. However, the City of Tucson has restricted GST's ability to use its existing license to a narrowly circumscribed area within Tucson. Thus, to serve its customers, GST requires a new non-exclusive license to provide long distance telecommunications throughout Tucson.

9. The grant of a non-exclusive franchise is necessary to allow GST to construct, maintain, and operate fiber optic telecommunications facilities in, over, under, and across portions of the City of Tucson's public rights-of-way for the purpose of providing competitive local exchange telecommunications within Tucson.

10. Relying on Chapter 7B of the Tucson Code, however, the City of Tucson, will only grant such non-exclusive license/franchise to GST on the condition that GST pay the

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City an amount equal to five and one-half per cent (5.5%) of GST's gross annual revenues from customers served within the City's corporate limits. As a further condition of granting such non-exclusive license/franchise to GST, the City of Tucson will require GST to expressly waive any and all objections to the reasonableness or legality of any license/franchise terms and provisions. Sec,Chapter 7B of the Tucson Code, Section 4, attached hereto as Exhibit D, and the April 19, 1996, correspondence of Richard M. Rollman, attorney for the City of Tucson, attached hereto as Exhibit E. Significantly, the City's April 19, 1996, correspondence evinces the perspective that two other telecommunications carriers operating in Tucson, Brooks Fiber and ACSI, in accepting franchises under Chapter 7B, have waived their respective rights to contest the City of Tucson's franchise agreement.

11. The City of Tucson does not impose any license/franchise terms and conditions on U S West Communications, a telecommunications carrier presently conducting business and offering telecommunications services within the City of Tucson's corporate limits. More particularly, the City of Tucson does not require U S West Communications to pay franchise fees to the City in any amount, nor require U S West Communications to waive any objections to the City's management of its public rights-of-way. In fact, U S West Communications does not have to comply with Chapter 7B of the Tucson Code in any fashion.

12. GST, in all respects, qualifies for a license/franchise in the City of Tucson, and would be granted a license/franchise--but for contesting the City's disparate and unequal treatment in favoring U S West Communications over other telecommunications carriers

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providing telecommunications services in Tucson. See, attached Exhibits B and C.

13. Designed to create a level playing field, the Telecommunications Act of 1996 constitutes a national policy framework calculated to rapidly bring about "private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Conference Report on Telecommunications Act of 1996, H.Rep. 104-458, 104th Cong., 2d Sess., January 31, 1996, p. 113. To achieve that end, Section 253(c) of the Telecommunications Act of 1996 expressly requires that local governments manage their rights-of-way and impose fees "on a competitively neutral and nondiscriminatory basis."

14. In requiring GST, a new entrant, to both pay a license/franchise fee and waive its rights to later contest such fee, while foregoing such requirements in the case of U S West Communications,--the dominant incumbent carrier--the City of Tucson has engaged in discriminatory conduct in a violation of Section 253(c) of the Telecommunications Act of 1996, 47 U.S.C. § 253(c).

15. The City's inexplicable failure to manage its right-of-way on a competitively neutral and nondiscriminatory basis has not only damaged GST's ability to provide competitive telecommunications services in Tucson, but also undermined the local citizen/consumer's right of choice in the new era of open competition in all telecommunications markets.

WHEREFORE, plaintiff GST Tucson Lightwave, Inc. and its affiliates pray:

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A. For a declaration and judgment that the City of Tucson cannot impose fees and terms on one telecommunications carrier while failing to impose such fees and terms in the case of another, and that Chapter 7B of the Tucson Code is invalid and void and unenforceable unless applied equally and fairly to all telecommunications carriers providing telecommunications services in the City of Tucson.

B. For an injunction permanently restraining and enjoining defendant City of Tucson from applying any fees and terms against GST unless such fees and terms are applied equally and fairly to all telecommunications carriers providing telecommunications services in the City of Tucson.

C. For an injunction permanently enjoining defendant City of Tucson to immediately process and grant GST a license/franchise in accordance with any rulings and orders issued by this court.

D. That the Court award plaintiff reasonable costs.

E. For such other and further relief as this Court may deem just and proper.

DATED this 13th day of May, 1996.

GST TUCSON LIGHTWAVE, INC.

By: _____
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